

**STATE OF NEW HAMPSHIRE**  
**DEPARTMENT OF LABOR**  
**CONCORD, NEW HAMPSHIRE**



V

**Attention Deficit Disorder Association**

**DECISION OF THE HEARING OFFICER**

**Nature of Dispute:** RSA 275:43 I unpaid wages/commissions  
RSA 275:42 I/.II employer/employee relationship

**Employer:** Attention Deficit Disorder Association, PO Box 103,  
Denver, PA 17517

**Date of Hearing:** July 16, 2015

**Case No.:** 50546

**BACKGROUND AND STATEMENT OF THE ISSUES**

The claimant asserts she is owed \$3,500.00 in unpaid wages for hours worked between August 22, 2014 and September 25, 2014. She initially signed a contract with Attention Deficit Disorder Association in 2012 as an independent contractor, but at the time she did not understand the distinction between an employee and independent contractor.

After filing for benefits with New Hampshire Employment Security, that agency determined she did not meet their criteria to be an independent contractor and ruled she was an employee. She acknowledged the criteria to establish an independent contractor for New Hampshire Employment Security differ from this agency, however, after a review of RSA 275:42 I/II she believes she is an employee.

Attention Deficit Disorder Association denies the claimant was an employee as he feels she meets all the criteria established by this Department under RSA 275:42 I/II. He acknowledges they agree the claimant is due approximately \$2,000, but not the \$3,500 she is claiming.

He also noted that they are seeking to withhold any payments to the claimant awarded through New Hampshire Employment Security from the wages she seeks as due.

Attention Deficit Disorder Association requested to appear telephonically for this hearing, which the Department granted. At the hearing, Mr. Druce acknowledged he was driving in traffic outside of Philadelphia, utilizing his hands free equipment, and did not have specific information or documentation to be prepared for the hearing.

## **FINDINGS OF FACT**

This Department must first to determine whether the claimant was an employee or an independent contractor. RSA 275:42 II defines "employee" as, "means and includes every person who may be permitted, required, or directed by any employer, in consideration of direct or indirect gain or profit, to engage in any employment, but shall not include any person exempted from the definition of employee as stated in RSA 281-A:2, VI(b)(2), (3), or (4), or RSA 281-A:2, VII(b), or a person providing services as part of a residential placement for individuals with developmental, acquired, or emotional disabilities, or any person who meets all of the following criteria:

(a) The person possesses or has applied for a federal employer identification number or social security number, or in the alternative, has agreed in writing to carry out the responsibilities imposed on employers under this chapter.

(b) The person has control and discretion over the means and manner of performance of the work, in that the result of the work, rather than the means or manner by which the work is performed, is the primary element bargained for by the employer.

(c) The person has control over the time when the work is performed, and the time of performance is not dictated by the employer. However, this shall not prohibit the employer from reaching an agreement with the person as to completion schedule, range of work hours, and maximum number of work hours to be provided by the person, and in the case of entertainment, the time such entertainment is to be presented.

(d) The person hires and pays the person's assistants, if any, and to the extent such assistants are employees, supervises the details of the assistants' work.

(e) The person holds himself or herself out to be in business for himself or herself or is registered with the state as a business and the person has continuing or recurring business liabilities or obligations.

(f) The person is responsible for satisfactory completion of work and may be held contractually responsible for failure to complete the work.

(g) The person is not required to work exclusively for the employer.

The Hearing Officer finds that the claimant was an employee of an employer, not an independent contractor, because the claimant does not meet the criteria in (b), (c), (d), (e), or (f). The claimant testified credibly that the employer dictated the means and manner of the work to be performed, and the majority of the time during which the work was to be performed. The claimant did not hire her own assistants. The claimant did not hold herself out to be in business for herself and did not have any recurring business liabilities or obligations. The claimant was not responsible for the satisfactory completion of work, and she could not be held contractually responsible for failure to complete the work.

The claimant worked for the Attention Deficit Disorder Association (hereafter "the employer") from August 2012 through September 2014, when she discontinued working due to the employer failing to pay wages. At all relevant times for this claim, the claimant received a biweekly wage of \$1,400.80.

The claimant provided credible testimony and evidence, previously submitted, that she performed work for the benefit of the employer between August 22 and September 25, 2014, five weeks, and did not receive her wages.

The employer's argument that he could not confirm whether or not she worked or was supposed to be working through September 2014, because the former Treasurer is no longer with the organization, is not credible or persuasive. He did agree she is due approximately \$2,000.00, but they simply do not have the money to pay her.

The employer argues they should be able to withhold any payments to the claimant awarded through New Hampshire Employment Security from the wages she seeks as due.

There is simply no statutory authority to allow the employer to deduct payments made pursuant to a New Hampshire Employment Security decision from an employee's wages.

The Hearing Officer finds the claimant proved by a preponderance of the evidence that the claimant is due the claimed wages in the amount of \$3,500.00 (two biweekly payments of \$1,400.80 and one half of a biweekly payment, or \$700.40.

### **DISCUSSION**

The claimant has the burden of proof in these matters to provide proof by a preponderance of evidence that her assertions are true.

Pursuant to Lab 202.05 "Proof by a preponderance of evidence" means a demonstration by admissible evidence that a fact or legal conclusion is more probable than not.

The Hearing Officer finds the claimant met her burden in this claim.

### **DECISION AND ORDER**

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that she is owed the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of \$3,500.00.

The employer is hereby ordered to send a check to this Department, payable to [REDACTED], in the total of \$3,500.00, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey  
Hearing Officer

Date of Decision: July 28, 2015

MJD/kdc